U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION
STATE AND LOCAL ISSUES AND MUNICIPAL NETWORKS

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Good morning Mr. Chairman and members of the Committee. My name is Bob Sahr and I am the Chairman of the South Dakota Public Utilities Commission. My comments today are those of an individual Commissioner. I thank you for the opportunity to testify before you.

I applaud the Committee's leadership on the issues of municipal broadband and the role of federal, state and local government in the digital world. The United States is at a critical juncture in terms of how we fund our telecommunications networks and how we ensure every American has access to state-of-the-art telecommunications, including broadband. Today's policy decisions will have far-reaching effects on our nation's economy and on the health, education and public safety of our citizens. Broadband and telecommunications services are the great equalizers that can bring amazing opportunities to all Americans, whether they live in metropolitan areas or on a farm or ranch on the prairie in my home state of South Dakota.

Broadband and telecommunications services also give our international competitors similar opportunities. The stakes are high and the time to act is now; recent statistics showed the United States dropping from 13th to 16th place in terms of broadband penetration. To compete in the global marketplace, the United States must have a robust telecommunications infrastructure, and this requires federal, state and local policies that encourage investment in our telecommunications networks.

I have been asked to make remarks on the following topics:

I. Whether municipal or municipal-sponsored broadband networks should be restricted and what the impact on competition might be; and

II. The appropriate role of federal, state and local government in the digital world and why.

I. MUNICIPAL BROADBAND NETWORKS

A. Introduction

Municipal governments, as well as other policy-makers, have legitimate interests in ensuring constituents have access to broadband networks. Without broadband, a community's ability to attract and maintain business, to offer critical public services and to provide opportunities to its residents is severely hampered. I applaud municipal leaders for looking for innovative, market-enhancing ways to have broadband delivered to their towns and cities. I have worked closely with local leaders on this very topic in my home state.

However, before pursuing a municipal-owned or sponsored network, we should first look to private solutions. Our nation's telecommunications providers have made substantial investments in their systems, and technology on the horizon will allow them to deliver more and richer broadband to more consumers. We must be particularly mindful of municipal action that displaces or discourages private investment.

Balancing the legitimate municipal interests with a strong preference for free market solutions, we can develop a framework that encourages the most efficient and effective use of both private and public resources and delivers state-of-the-art services to all consumers at affordable prices.

B. Preference for Private Solutions

Nationwide, our telecommunications providers are making enormous investments in their networks and in the research and development of innovative products and services. This is

happening across the country in rural and urban areas alike and with both wireline and wireless technologies.

According to recent Federal Communications Commission (FCC) statistics, the annual household expenditures in 2003 were $441 for local exchange carriers, $122 for long distance carriers and $492 for wireless providers. In 2002, wireline carriers spent $34.8 billion and wireless carriers spent $20.5 billion on structures and equipment. In 2004, our nation invested nearly $5.7 billion in telecommunications infrastructure through universal service funding including almost $3.5 billion for high-cost support. We all have an interest in seeing these investments fully utilized.

This substantial investment is paying off and delivering broadband to more and more consumers. FCC figures show that high-speed connections to the internet increased 34 percent in 2004.

In my home state of South Dakota, a rural state with less than 10 residents per square mile, we have amazing telecommunications success stories made possible by the investment, foresight and innovation of our state's providers. More than 200 communities, many of them very small, have broadband access. The overwhelming majority of these communities are served by cooperatives, tribally-owned entities and family-owned companies that, during the past five years, have invested $300 million in capital improvements alone. Our larger cities have brisk competition with two or more providers, including incumbent phone and cable companies plus over-builders, offering services. This has resulted in lower prices — bundled voice, video and broadband services can currently be purchased for $72.95 per month in the Rapid City market — as well as innovation. Over two years, our largest wireless companies have invested well over $150 million in their systems and are in the process of building one of the best rural wireless

networks in the nation. Finally, a number of small, entrepreneurial ventures are offering wireless broadband, not just in our cities but also in some of the most rural parts of the state. These providers are not just content to serve their current customers but are constantly looking for ways to enter new markets and offer new services. The entrepreneurial spirit is alive and well in South Dakota and our consumers reap its benefits.

If our country wants to encourage investment in private networks; if our providers are to have access to the necessary capital to adequately invest in their systems; and if our consumers are going to see the benefits of investment, innovation and competition, including lower prices and advanced services; then we must ensure government ownership meets appropriate criteria and does not waste or usurp private investment.

C. Legitimacy of Local Government Interests in Broadband

Without a doubt, every local government has a legitimate interest in seeing its residents and businesses have access to state-of-the-art telecommunications including broadband.

I am incredibly sympathetic to communities that lack broadband and have met with people from such communities within my own state and listened to their concerns. Their ability to educate their children, keep their communities safe and compete in the global economy is severely hampered. Every opportunity, including municipal ownership or sponsorship, must be evaluated. My fellow commissioner, Dustin Johnson, and I have pledged our assistance to look for ways to bring broadband to these communities. And, in some of these instances, public ownership or public-private partnerships may be the only option. However, on the policy front, we must ensure that opportunities for private investment are given full consideration and that municipal entry is a last resort.

I would differentiate these communities that lack any broadband options from

communities in which municipalities or municipally-sponsored entities enter markets where broadband is already available. Without some type of market failure, municipal entry, in my opinion, is highly suspect.

D. Possible Frameworks for Municipal Entry

1. *Guiding Principles*

How do we balance the legitimate municipal interest in broadband with a preference for private investment? Here are some guiding principles that can help answer this question.

First, municipalities should act only where a market failure exists.

Second, where market failure exists, communities should ascertain whether or not providers are willing to serve the market immediately or in the near term. One of the best possible sources for a broadband solution may be a provider that already has networks in close proximity to the underserved area. This step should also include the consideration of whether or not technological improvements or lower investment costs may yield a broadband solution in the immediate future.

Third, municipalities should consider available funding sources and possible incentives to attract private investment. These could include federal assistance through broadband loans and grants, a variety of state and local tools to encourage investment, and even marketing the area as a test market for providers or equipment manufacturers.

Fourth, after pursuing the first three options, municipalities should consider public-private partnerships. This has the benefit of bringing private experience to the venture and helps the community share some of the risk of the project versus pursuing a solely-owned network. Additionally, the municipality may have expertise, facilities or other advantages that may make an otherwise unviable network attractive to private investment.

Fifth, municipalities, after assessing the appropriate risks and benefits, may consider constructing and operating a municipal-owned or sponsored network. In these situations, the municipality should continue to evaluate opportunities for non-governmental solutions.

2. ***Examples of the Right Approaches***

A recent example of how these steps can work comes from Timber Lake, South Dakota. Timber Lake, a city of 443 residents, lacks broadband. Local leaders contacted our office for assistance. We worked with the community to formulate a plan. First, we met with the providers currently serving the city and those with facilities near the city. While all providers expressed interest in providing broadband, they uniformly stated the probable customer base would not justify the capital expenditures necessary to provide high-speed internet. The City of Timber Lake then applied for a United States Department of Agricultural Broadband Community Connect Grant. Last fall, USDA selected Timber Lake for a $393,309 grant to construct a wireless broadband network and other improvements. It will be built and maintained by a private provider with assistance from the City.

Although, as mentioned previously, my home state of South Dakota has many broadband success stories, we do have cities and towns lacking broadband. I want to thank you, the other members of Congress and President Bush for supporting programs such as the USDA Broadband Community Connect Grant program. Where market failures exist and private investment alone cannot bridge the digital divide, this type of program can bring broadband to communities for the first time and make a huge difference in people's lives.

I would offer for the committee's consideration two other methodologies for evaluating the appropriateness of municipal ownership or sponsorship of broadband networks.

One, in August 2005, the South Dakota Association of Telephone Cooperatives endorsed a proposal urging the prohibition of municipalities from delivering wireless or other types of high speed Internet unless:

1) There is no similar service being offered in said municipality,

2) The municipality can show that no private communications provider is planning to offer wireless or other types of high speed internet service in the foreseeable future,

3) The municipality can show that the service would be economically feasible without a subsidy of public funds, and

4) The municipality can demonstrate public support by means of a public vote or some other show of public support.

Two, the State of Florida enacted a law in 2005 governing municipal entry into telecommunications services. Under that law, a governmental entity proposing to provide communications service must make available to the public a written business plan for the venture and must hold no less than two public hearings, not less than 30 days apart, in which the following shall be considered:

- Whether the service is currently provided in the community and whether it is generally available throughout the community.

- Whether a similar service is currently being offered in the community and is generally available throughout the community.

- If the service is not being offered, whether any other provider proposes to offer the same or similar service and what, if any, assurances that service provider has offered that it is willing and able to provide the same service.

- The capital investment required by the government entity to provide the communications service, the estimated operation and maintenance costs, the estimated realistic revenues and expenses of providing the service, and the proposed method of financing.

- Private and public costs and benefits of providing the service by a private entity or a governmental entity, including economic development impacts, tax-base growth, education, and public health.

E. Inappropriate Government Action

In the worst cases, government ownership usurps, prohibits or discourages private investment. One of the most egregious cases is currently pending before the Federal Communications Commission and involves the Massachusetts Port Authority's attempt to create a monopoly on Wi-Fi services at Boston's Logan International Airport.

Seeking to create a monopoly in itself for the provision of wireless broadband at Logan Airport, Massport seeks to restrict the deployment and use of *unlicensed* wireless services by third parties (like Continental airlines, which wants to provide free wireless to its customers). Massport seeks to require airlines or any other tenant of Logan Airport to use a central antenna installed by Massport. A third-party vendor selected by Massport would, in turn, exclusively maintain this central antenna. The airlines, airline employees, airport patrons and customers, and service providers would be denied any right to utilize the provider of their choice – including ones willing to provide free service. So, instead of promoting a competitive marketplace for wireless services, Massport would grant a monopoly to a sole service provider of its choice and would, directly or through delegation to the monopoly service provider, set the price for wireless services at Boston's Logan Airport. Massport's actions, if permitted, would severely undermine the promotion of competitive wireless markets and the promotion of the deployment of advanced broadband capabilities for all Americans.

While this may be an extreme case, municipal networks can generally have a chilling effect on private investment and stifle competition and its consumer benefits. Whether in a major metropolitan area or a small town in rural America or somewhere in between, municipal broadband removes markets and customers from a private provider's pool. This can greatly hamper a provider's ability to build and maintain state-of-the-art networks across a region or

across the country because of the loss of potential customer base. So not only are consumers in the municipally-served market injured because they do not receive the benefits of competition, but also consumers outside that market suffer harm because their provider has lost the ability to spread costs over a larger customer base.

F. Questions Raised by Municipal Ownership

Municipally-owned or sponsored networks raise a whole host of questions, especially in areas where private companies exist or are willing to serve:

- Will municipal networks assume ill-advised technological or business risks?
- Do municipal networks have advantages unavailable to competitors in building networks such as access to streets, rights-of-way and government property?
- Will municipal networks cover risks by using tools available to them because of their non-profit or governmental status such as bonding or taxing authority?
- Will a municipality cross-subsidize its telecommunications network?
- Do municipal networks pay the same taxes and fees, including municipal ones, as competitors?
- What happens if a municipal system wants to extend its service beyond municipal boundaries, an opportunity that is relatively easy with wireless networks?

Finally, municipally-owned or sponsored networks can create regulatory asymmetry. At a time when we are evaluating the federal/state/local relationships and looking for a level regulatory playing field regardless of technology, municipally-run systems raise additional questions on the regulatory front. In particular, when do state and federal rules govern another governmental entity and its telecommunications ventures?

In summary, we can balance the legitimate municipal interests in assuring access to broadband networks with a preference for private solutions. The aforementioned guidelines should serve as suggestions for developing appropriate criteria for municipal entry. This strategy

will encourage private investment in our nation's telecommunications infrastructure, foster competition and bring more advanced services to consumers at lower prices.

II. FEDERAL, STATE AND LOCAL GOVERNMENT ROLES

A. Federal Roles

I have been asked to briefly address the appropriate role of federal, state and local government in the digital world.

While I consider myself a strong state's rights advocate, there are some areas where national uniformity is appropriate. A good example is the current Federal Communications Commission's Truth-in-Billing docket. The docket brings consistency to the regulation of providers, requires that all carriers provide accurate billing information, clarifies what constitutes misleading charges and eliminates varying treatment of certain charges across state lines. These principles protect consumers and ensure that inconsistent state regulations do not adversely impact competition and the corresponding consumer benefits. Under these types of circumstances, consumers are best served by uniform national standards.

The FCC has tentatively concluded that there is support for preemption of state regulations related to billing. I respectfully suggest that in certain areas, like truth-in-billing, a national regulatory framework that clearly provides for federal oversight is necessary for a continued competitive wireless market.

Undoubtedly, both the states and the federal government share an interest in ensuring that consumers are not defrauded. A uniform approach on issues like billing practices, however, would best serve to protect consumers' rights. A national framework of federal rules would: provide greater uniformity to wireless bills; eliminate confusion with respect to consumers' rights by providing clear national standards that are applied similarly in every state; increase

consumer choice by eliminating excessive state regulation which, together with the associated costs; and promote competition among wireless carriers.

B. State and Local Government Roles

On the other hand, I would urge the Committee not to jump to the conclusion that federal preemption should be the rule across-the-board for all issues. State and local governments are well-suited to address a number of important issues.

1. *Consumer Protection*

Clearly, state public utilities commissions and attorneys general have essential consumer protection roles. My experience is that, in the vast majority of circumstances, consumers would much rather pursue their claims closer to home and that commissions and attorneys general alike show great ability to resolve disputes in a cost-effective, timely manner.

2. *Dispute Resolution*

An interesting side effect of moving toward a competitive telecommunications marketplace has been the growing need for state and federal policy-makers to resolve disputes among competing carriers. While the days of monopoly regulation and telephone rate-making are gone in most states, complex commercial disputes before state commissions has taken its place. A state commission might find itself busier in a "deregulated" or "competitive" world than it was in the "regulated" world. Unless major changes are made to the size and breadth of the FCC or unless the decision is made to turn a long line of disputes over to courts, state commissions will continue to play a vital role refereeing the telecommunications providers.

3. *Market Monitoring*

More complex are the boundaries for state and local government in areas like market evaluation, competition and franchising. State commissions and local governments bring a great

appreciation and understanding of how local markets work. While occasionally needing limits on unfettered discretion and while respecting that certain issues should be decided on the federal level, state and local governments have a keen ability to monitor marketplaces and to sometimes develop better solutions to complex problems than can formulated through one-size-fits-all federal dictates.

4. *Roles for Innovative State Policies*

Beyond these principles lies a great opportunity for states and local governments to be innovators, often in conjunction with telecommunications providers. While I have heard numerous critiques of state and local policy-makers, many of them ill-placed but some on point, one that probably has merit but is rarely mentioned is our failure to seek out and encourage innovative solutions.

While I firmly believe that limited government is best and that private industry should take the lead in most circumstances, it would be a mistake to preclude state and local initiatives. My state's former Governor, William Janklow, had the vision to wire every school in the state for broadband and to build a state radio network that allows every first responder to communicate on the same system using the same equipment. Although I am sure you are more concerned with regulation of telecommunications providers, these are prime examples of state roles that serve consumers and the public well.

In response to consumer input asking for improved wireless service in the rural parts of my state, I formulated the South Dakota Wireless Initiative in 2002. Instead of erecting barriers to entry, we looked for ways to encourage wireless companies to invest in the state. We worked with local leaders to help them make their cases for better service, emphasized the importance of reasonable zoning and looked for local resources to speed the delivery of services. Governor

Michael Rounds and our commission notified the providers that South Dakota wanted their investment and would look for ways to facilitate rural networks. Our office met with the providers and worked with them to evaluate options. We furnished them with traffic counts, demographics, local knowledge and information about existing towers and structures that could serve as possible sites.

The wireless providers responded by putting record investment into our state. Cellular One/Western Wireless, which is now Alltel, and Verizon Wireless built approximately 40 towers in South Dakota in 2004. Many of these sites brought state-of-the-art digital services to underserved rural communities for the first time. The wireless buildout continued in 2005, and 2006 looks to be a great year for our state's consumers. While state government had a role, the providers themselves ultimately deserve the credit as they decided to invest their resources in South Dakota.

This ongoing success story was made possible, at least in part, by the current regulatory framework. As you probably know, federal telecommunications law preempts states from regulating wireless pricing and market entry. This approach undoubtedly has led to the tremendous investment in wireless networks and the industry's rapid growth, and, in the case of our state, gave the providers access to the capital necessary to build the towers. At the same time, if state and local government had no role whatsoever, then we may not have been as successful in encouraging the wireless providers to invest in our state and communities. In the case of Alltel, a company receiving universal service funds for the South Dakota market, federal policy decisions that made USF available to wireless providers and that delegated states compliance oversight together created a framework where: 1. a provider has sufficient capital to invest in rural networks and 2. state government is responsible to ensure service is provided

throughout the service territory. The South Dakota wireless success story demonstrates that beyond traditional state "regulation" there can be a proactive state role of "facilitation" and perhaps even "innovation."

III. CONCLUSION

In closing, I would respectfully urge you to do everything in your power to encourage investment in the nation's telecommunications infrastructure and, as a part of this, to develop a framework that balances legitimate municipal interests in broadband with a preference for private solutions. Finally, as you grapple with these and many other important telecommunications matters, please keep in your mind the challenges faced in constructing and supporting rural telecommunications networks. If South Dakota and other rural states fall behind a digital divide, the entire country will suffer.

Thank you for inviting me here today. I appreciate the opportunity to testify before you.